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Supreme Court of the United States

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
PETITIONERS,

vs.

UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1961
CERTIORARI GRANTED MAY 8, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 59

SUZANNE THOMAS RICHARDS, ETC., ET AL.,
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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4272, Civil

HARVEY BARUCK, Administrator of the Estate of ROBERT I. ZELENS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4273, Civil

CLARINE FAROUGH, individually, and for the use and benefit of JOHN ALLEN FAROUGH and MARY KAY FAROUGH, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4274, Civil

BERNICE L. MAUPIN, individually, and for the use and benefit of MARIE ELLEENE MAUPIN, a minor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4275, Civil

[fol. 2]

MARGARET J. HOWE, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4276, Civil

ELIZABETH R. CROSS, Executrix of the Estate of JOHN LELAND CROSS, JR., Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4277, Civil

THERESE B. AKIN, Executrix of the Estate of MORRIS W. AKIN, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4278, Civil

ALTHEA S. GATES, nee BERGTHOLDT, individually, and for the use and benefit of WILLIAM RANDALL GATES, a minor, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4279, Civil

RUTH JEAN CARR-HARRIS, Administratrix of the Estate of DONALD DALE CARR-HARRIS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4280, Civil

[fol. 3]

ANNA MAE O'NEAL, surviving widow of WILLIAM E. O'NEAL, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4281, Civil

MARGARET EMMA BARRON, individually, and for the use and benefit of CHARLES DONOVAN BARRON and WILLIAM BROOKS BARRON, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4282, Civil

MYRA FIELDS, Administratrix of the Estate of HAROLD M. FIELDS, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4283, Civil

VIRGINIA HOBSON, individually and for the use and benefit of JOHN HOBSON, DAVID HOBSON, STEVEN HOBSON, SAMMY HOBSON, and TIMOTHY HOBSON, minors, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4284, Civil

JOSEPHINE M. SCHMYSER, Administratrix of the Estate of HERMAN F. SCHMYSER, Deceased, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

vs.

AMERICAN AIRLINES, INC., Third Party Defendant.

No. 4285, Civil

[fol. 4]

COMPLAINT (No. 4272)—Filed August 2, 1957

Comes now your complainant, Suzanne Thomas Richards, nee Wadlow, individually and for the use and benefit of Debra Sue Richards, a minor, and respectfully shows this Court:

I. Your complainant is a citizen and resident of Willard, State of Missouri, and is the widow and surviving spouse of Kurt D. Richards, deceased. There have been no administrative proceedings had upon the Estate of Kurt D. Richards, deceased. This action arises under the Federal Tort Claim Act, by Section 1346-B and 1402 B of Title 28, U. S. Code, the defendant, United States of America, a sovereign body, has consented to be sued and is suable in this Court.

II. This action is brought under the Oklahoma Wrongful Death Statutes, on behalf of your complainant. Suzanne Thomas Richards, nee Wadlow, surviving widow of Kurt D. Richards, deceased, and for the use and benefit of Debra Sue Richards, a minor daughter of Kurt D. Richards, deceased, for pecuniary damages resulting from the wrongful death of Kurt D. Richards caused by the negligence and want of care of the defendant, United States of America, as hereinafter more fully set forth.

III. Prior to and at all times hereinafter mentioned American Airlines, Inc., was a scheduled air carrier operating under a currently effective certificate of convenience and necessity, issued by the Civil Aeronautics Board, under the terms of the Civil Aeronautics Act and regulations issued thereunder, and an air carrier operating certificate issued under the Act by the Civil Aeronautics Administration. American Airlines, Inc., owns and operates a repair and maintenance depot in the City of Tulsa, in the Northern Judicial District of Oklahoma, commonly known as the American Overhaul Base of Tulsa. Among the functions of the Overhaul Base is the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts. The defendant, United States of America, under the provisions and terms of the Civil Aeronautics Act, and through the Civil Aeronauticis (sic) Administration, control, inspect and supervise the operation of the American Airlines, Inc., in the work that they perform at their overhaul base at Tulsa, in the repair, rebuilding and overhauling of their aircraft, aircraft engines and component parts. Your complainant believes, and therefore alleges, that it was the duty of the defendant, United States of America,

through its agency, the Civil Aeronautics Administration to [fol. 5] enforce the terms of the Civil Aeronautics Act, the regulations issued thereunder and to require that the work performed by American Airlines, Inc., in repairing, rebuilding, overhauling and inspection of its aircraft, aircraft engines, and component parts, complied with the terms of the Civil Aeronautics Act and all existing regulations of the act and Civil Aeronautics Administration. In addition to the enforcement of the Civil Aeronautics Act and the regulations thereunder, it was the duty of the defendant, United States of America, through the Civil Aeronautics Administration to see that American Airlines, Inc., complied with all manufacturers requirements on the equipment they used, and to see that the system and method used by American Airlines, Inc., in the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts was safe and provided the necessary inspection to insure that all aircraft, aircraft engines or component parts thereof were airworthy after repair or rebuilding.

IV. That for a long time prior to August 4, 1955, American Airlines, Inc., was engaged in unsafe practices in repair, rebuilding, overhauling and inspection of its aircraft, aircraft engines and component parts, particularly in regard to the inspection, repair and overhaul of aircraft engines and the cylinders therein. That the defendant, United States of America, through its agency, the Civil Aeronautics Administration, and their personnel station at the American Airlines Overhaul Base, knew, or by the exercise of ordinary care should have known of these unsafe and negligent practices; that the defendant, United States of America, through its agency, Civil Aeronautics Administration, had a positive duty under the Civil Aeronautics Act to correct these practices, that despite this duty they negligently failed to correct said unsafe practices, they negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines, Inc., in the overhaul depot of Tulsa, Oklahoma; they negligently failed to see that the work being done by the personnel of American Airlines, Inc., adhered to the highest degree of care

necessary to insure the safety of the traveling public, and they negligently failed to see that the system and methods used by the American Airlines Inc., in the repair, rebuilding, overhaul and inspection of its aircraft, aircraft engines and component parts were safe and provided the necessary inspection to insure the airworthiness of the repaired or rebuilt aircraft, aircraft engines and component parts. Complainant believes, and therefore alleges, that the United States of America, through its agency, the Civil Aeronautics [fol. 6] Administration had a duty to the public generally, and to your complainant's decedent particularly, to see that the work done by the American Airlines Overhaul Base was done in compliance with the terms of the Civil Aeronautics Act and the regulations issued pursuant thereto, as failure to so comply would result in danger to those persons traveling upon American Airlines airplanes.

V. Complainant alleges that as a result of the negligence and failure of the United States of America a cylinder which should have been condemned and scrapped as unfit and unworthy to be used in the operation of an airplane engine, was removed from one engine, overhauled and placed in another engine and installed as an integral part of a Convair 240 Airplane, known as American Airlines Aircraft N94221.

On August 4, 1955, American Airlines, Inc. dispatched Convair 240 Airplane, N-94221, as Flight 476, on a scheduled Field, New York, with intermedicate (sic) stops enroute. That your complainant's decedent was a passenger for hire lawfully aboard said airplane, having duly paid his fare. That said airplane, while enroute from Springfield, Missouri to St. Louis, Missouri, crashed in the vicinity of Fort Leonard Wood, Missouri, at approximately 12:23 p.m., as the result of an uncontrollable fire in the engine caused by the failure of the defective and unairworthy cylinder which had been installed therein, as a result of the negligence, carelessness and want of care of the defendant, United States of America, by and through its agency, Civil Aeronautics Administration and the personnel connected therewith.

VI. Complainant alleges that the crash and death of her decedent was caused by the negligence of the United States

of America, its agents, servants, and employees in and about its control, supervision, of the repair, rebuilding, overhauling and inspection of said aircraft, its engines and component parts at the American Airlines Overhaul Base at Tulsa, Oklahoma, as heretofore set out, and was due to no fault or lack of care on the part of the complainant's decedent.

VII. Complainant alleges that at the time of his death, Kurt D. Richards was 34 years of age with a life expectancy of 36.59 years and at the time of his death was the sole support of Suzanne Thomas Richards nee Wadlow and Debra Sue Richards. That as a result of the carelessness, negligence and want of care of the defendant, as heretofore [fol. 7] set out, Suzanne Thomas Richards nee Wadlow and Debra Sue Richards have been deprived of the love, affection, guidance, companionship and support of the deceased, Kurt D. Richards, deceased, and as a result thereof has been damaged in the sum of $300,000.00.

Wherefore, complainant demands judgment against the defendant in the sum of $300,000.00, together with the costs of this action.

Speiser, Smith & O'Brien, Rucker, Tabor & Cox,
By Joseph A. Sharp, Attorneys for Complainant.

IN UNITED STATES DISTRICT COURT

ANSWER OF UNITED STATES OF AMERICA (No. 4272)
—Filed November 22, 1957

Comes now the United States of America, by B. Hayden Crawford, United States Attorney, and Russell H. Smith, First Assistant U.S. Attorney, for the Northern District of Oklahoma, and for its answer to the complainant herein states and alleges that:

First Defense.

1. It is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph I of the complaint except that, as to the averment contained

therein that this action arises under the "Federal Tort Claims Act," it admits that in appropriate circumstances this defendant would be subject to suit under the provisions of said Act, but denies that any action against this defendant arises from the facts here involved.

2. It is without knowledge or information sufficient to form a belief as to the truth of averments in paragraph II, except that it denies that the death of Kurt D. Richards was caused by any negligence or want of care of this defendant.

3. With respect to averments contained in paragraph III of the complaint, this defendant admits the averments contained in the first three sentences of said paragraph. It ad- [fol. 8] mits that the Civil Aeronautics Administration had certain duties pertaining to the inspection of the operations of American Airlines, Inc. in the repair, rebuilding, and overhauling by American Airlines, Inc. of its aircraft, aircraft engines and component parts, which duties are prescribed by pertinent statutory and regulatory provisions to which reference is hereby made. It denies each and every other averment in said paragraph.

4. With respect to the averments contained in paragraph IV of the complaint, it is without knowledge, or information, sufficient to form a belief as to the truth of the averments contained in the first sentence of said paragraph; and it denies each and every other averment in said paragraph.

5. With respect to the averments contained in paragraph "V" of the complaint, it admits that the airplane described therein was, on August 4, 1955, on the operation therein described, and that said airplane crashed at or about the time and place therein alleged. It is without knowledge or information sufficient to form a belief as to the truth of the averment that the decedent was a passenger for hire lawfully aboard said airplane. It denies each and every other averment contained in said paragraph.

6. It denies each and every averment contained in the paragraph designated "VII" on the complaint, except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the averment that

said crash was due to no fault or lack of care on the part of the said decedent.

7. It is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph designated "VIII" of the complaint, except that it denies that any damage, which may have been suffered by the plaintiffs or other persons named in said paragraph on account of the death of the decedent, resulted from any carelessness, negligence or want of care of this defendant.

Second Defense.

8. This Court does not have jurisdiction in this action for the reason that the acts alleged in the complaint do not constitute a claim for which the United States, if a private person, would be liable to the plaintiffs or would have been liable to the plaintiffs' decedent in accordance with the law of the place where the alleged carelessness, negligence or want of care of this defendant occurred.

[fol. 9]

Third Defense.

9. This Court does not have jurisdiction in this action for the reason that any claim by the plaintiffs or any claim which the plaintiffs' decedent might have had against the United States based upon the facts alleged in the complaint would fall within the exceptions to the jurisdiction of this Court set forth in paragraph (a) of Section 2680 of Title 28, United States Code.

Fourth Defense.

10. The averments contained in the complaint fail to state a claim against this defendant upon which relief can be granted.

Wherefore, the defendant, United States of America, prays that the action herein against it be dismissed, together with its costs and disbursements as against the plaintiffs, and for such other and further use as may be just and proper.

B. Hayden Crawford, United States Attorney, Russell H. Smith, First Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

THIRD-PARTY COMPLAINT (No. 4272)
—Filed November 22, 1957

I. Plaintiff, Suzanne Thomas Richards, nee Wadlow, individually, and for the use and benefit of Debra Sue Richards, a minor, has filed against defendant, United States of America, a complaint, a copy of which is attached hereto as Exhibit A.

II. American Airlines, Inc., hereinafter styled third-party defendant, is a corporation chartered under the laws of the State of Delaware, but having a permit to do business in the State of Oklahoma, and having an agent in Oklahoma City, Oklahoma County, Oklahoma, upon whom process may be served.

III. It has been alleged in plaintiff's original complaint that the deceased, Kurt D. Richards, was a passenger on [fol. 10] American Airlines Flight 476 on August 4, 1955, and killed when that aircraft crashed near Fort Leonard Wood, Missouri, on that date.

IV. In plaintiff's original complaint, it is further alleged that such crash and the resultant death of Kurt D. Richards were caused by a defective cylinder, which had been installed in the right engine of the aircraft at the time when it was overhauled at the American Airlines maintenance and overhaul base at Tulsa, Oklahoma. It is alleged specifically in said complaint that the agents of the United States Government were negligent in failing to require American Airlines, Inc., to inspect, maintain, and repair properly the airplane, which crashed, and in allowing American Airlines, Inc., to install such defective cylinder.

V. American Airlines Flight 476 was a Convair Model 240 aircraft, Identification No. N-94221, which was owned by and under the sole operational control of American Airlines, Inc. at the time of the flight that terminated in the crash.

VI. American Airlines Flight 476, on August 4, 1955, was a flight operated by American Airlines, Inc., in schedules

interstate air transportation and subject to the provisions of Part 40 of the Civil Air Regulations (14 CFR Part 40, promulgated by the Civil Aeronautics Board).

VII. Under the provisions of Section 40.240 of the Civil Air Regulations (14 CFR 40.240), which was in force and effect on August 4, 1955, and is now in force and effect, American Airlines, Inc., had the primary responsibility for the airworthiness of its airplanes and their required equipment.

VIII. Any maintenance performed on aircraft N-94221, operated as American Airlines Flight 476 on August 4, 1955, including any overhaul of the right engine thereof, was performed by American Airlines, Inc., its agents, or employees.

IX. No maintenance work on aircraft N-94221, or its component parts, including the right engine installed therein, was performed by any agent or employee of the United States of America.

X. If the crash of American Airlines Flight 476, on August 4, 1955, in fact resulted from a defective cylinder, which had been negligently installed in the right engine thereof, the negligent act or omission was that of American Airlines, Inc., whose employees overhauled the cylinder [fol. 11] and installed the engine, and not of the United States of America.

XI. Without admitting that, upon the occasions referred to in plaintiff's original complaint, this defendant and third-party plaintiff, United States of America, acting through its servants, agents, and employees, was negligent, but expressly denying such negligence on the other hand, this defendant and third-party plaintiff, United States of America, would show such negligence, if any as may be found herein to have been committed by this defendant and third-party plaintiff upon said occasions, was passive, and the active and primary negligence upon any such occasion was committed by the third-party defendant, American Airlines, Inc., and this defendant and third-party plaintiff, United States of America, is entitled to recover against

the third-party defendant, American Airlines, Inc., as indemnitor, any such amount as may be adjudged in favor of plaintiff and against the United States as damages on account of such negligence.

Wherefore, the defendant and third-party plaintiff, United States of America, demands judgment against third-party defendant, American Airlines, Inc., for all sums of money that may be adjudged against defendant and third-party plaintiff, United States of America, in favor of plaintiff, Suzanne Thomas Richards, nee Wadlow, individually, and for the use and benefit of Debra Sue Richards, a minor.

B. Hayden Crawford, United States Attorney, Russell H. Smith, First Assistant U. S. Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF THIRD PARTY DEFENDANT (No. 4272) —Filed March 28, 1958

For its answer to the complaint of the third party plaintiff and for answer to the complaint of Suzanne Thomas Richards, complainant, American Airlines, Inc., states:

[fol. 12]

First Response.

The third party complaint does not state a claim against American Airlines, Inc., in favor of the United States of America upon which relief may be granted.

Second Response.

The complaint does not state a claim against United States of America in favor of the complainant upon which relief may be granted.

Third Response.

In consideration of the payment to her by American Airlines, Inc., and on its behalf, of the sum of Fifteen Thousand Dollars, the complainant on or about the 18th day of November, 1955, executed and delivered to American Airlines, Inc.,

a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which complainant is barred from the maintenance of this action.

Fourth Response.

The allegations of the following paragraphs of the third party complaint are admitted: Paragraphs I, II, III, IV, V, VI, VIII, and X; each and every other allegation of the third party complaint is denied.

Fifth Response.

That the alleged acts of negligence as set forth in the complaint and attributed to the defendant—third party plaintiff, if any, became operative in the State of Missouri in that the accident, referred to in the complaint, resulting in the death of Kurt D. Richards, occurred within the State of Missouri.

W. B. Patterson, Fred M. Mock, By Fred M. Mock,
Attorneys for Third Party Defendant.

Jury Trial Demanded.

[fol. 13] Pierce, Mock & Duncan

In United States District Court

Amended Answer of American Airlines, Inc. (No. 4272)
—Filed August 29, 1959

For its answer herein, American Airlines, Inc., states:

First Response.

The complaint does not state a claim against the United States of America in favor of the complainant upon which relief may be granted.

Second Response.

The third party complaint does not state a claim against American Airlines, Inc., in favor of the United States of America upon which relief may be granted.

Third Response.

The allegations of the following numbered paragraphs of the third party complaint are admitted: Paragraphs I, II, III, IV, V, VI, VIII, and IX; each and every other allegation of the third party complaint is denied.

Fourth Response.

The death of complainant's decedent became actionable, if at all, under the laws of the State of Missouri. R. S. Mo. 1939, Sec. 537.080:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

[fol. 14] 1. The cause of action of the complainant against the United States of America accrued on August 4, 1955, and said cause of action no longer existed after August 4, 1956. R.S. Mo. 1939, Sec. 537.100:

> "Every action instituted by virtue of Sections 537.070 to 537.090, 537.110 and 537.260, shall be commenced within one year after the cause of action shall accrue; * * *"

2. The complainant is, in any event, limited to a recovery of fair and just damages, not exceeding $15,000.00. R.S. Mo. 1945, Sec. 537.090:

> "Damages accruing under Section 537.080 shall be sued for and recovered by the same parties and in the same manner as provided in Section 537.070; and in every such action the jury may give such damages, not exceeding $15,000.00, as they deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be en-

titled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

3. The complainant is not the real party in interest. R.S. Mo. 1939, Sec. 537.070:

"1. Whenever any person, including any employee of the corporation, individual or individuals herein referred to whose death is caused by the negligence of a co-employee thereof, shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or any street electric or terminal car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stagecoach, automobile, motorcar or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal car, or in any steamboat, or the machinery thereof, or in any stagecoach, automobile, motorcar, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns, operates or conducts any such railroad, locomotive, [fol. 15] car, street car, electric car, terminal car, automobile, motorcar, stagecoach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, or any such officer, agent, servant, employee, master, pilot, engineer or driver, whose negligence, unskillfulness, or criminal intent shall cause such injury, shall forfeit and pay as a penalty for every such person, employee or passenger so dying, the sum of not

less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered:

(1) By the husband or wife of the deceased; or

(2) If there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased; provided, that if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption; or

(3) If such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or

(4) If there be no husband, wife, minor child or minor children, natural born or adopted as herein indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual or individuals or such officer, servant, agent, employee, master, pilot, engineer, or driver, may show as a defense that such death was caused by the negligence of the deceased."

[fol.16]

Fifth Response.

Negligence of the United States of America, which is not admitted and is specifically denied, was not a proximate

cause of the accident, and the complainant is accordingly barred from recovery of any damages against defendant United States of America.

Sixth Response.

At all times stated in the complaint defendant United States of America was wholly engaged in its sovereign, governmental functions from which it is immune to civil tort liability and the complainant is accordingly barred from recovery of damages. 28 U.S.C. § 2680:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Seventh Response.

The death of complainant's decedent was an unavoidable casualty in that it was not proximately caused by the negligence of the complainant, her decedent, or the United States of America.

Eighth Response.

In consideration of the payment to her of the sum of $15,000.00, on or about the 18th day of November, 1955, in the State of Missouri, the complainant executed and delivered to American Airlines, Inc., a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which, under the laws of the State of Missouri, complainant is barred from maintaining this action against defendant United States of America.

[fol. 17] W. B. Patterson, Fred M. Mock, Melvin F. Pierce, Pierce, Mock & Duncan, By Melvin F. Pierce, Attorneys for American Airlines, Inc.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF UNITED STATES OF AMERICA (No. 4272) —Filed February 9, 1959

Comes now the United States of America, by Russell H. Smith, First Assistant United States Attorney for the Northern District of Oklahoma, and files this amendment to its answer. The answer of defendant, United States of America, filed November 22, 1957, is incorporated by reference herein and made part hereof as if herein fully repeated.

I. The death of complainant's decedent was, as to the defendant, United States of America, an unavoidable casualty in that it was not proximately caused by the negligence of the complainant, her decedent, or the United States of America.

II. In consideration of the payment to her of the sum of $15,000 on or about November 18, 1955, in the State of Missouri, the complainant executed and delivered to American Airlines, Inc. a full and complete release acknowledging satisfaction of all claims on account of the death of Kurt D. Richards arising out of the accident of August 4, 1955, by virtue of which complainant is barred from maintaining this action against defendant, United States of America.

III. If the execution and delivery of the release hereinabove described does not have the effect of completely releasing defendant, United States of America, the amount of the consideration, for which the release was delivered, should be taken into account by way of mitigation of any damages, if any, which might be assessed against the United States of America.

Russell H. Smith, First Assistant United States Attorney.

Consent for filing: Speiser and O'Brien, Rucker, Tabor & Cox, By Joseph A. Sharp, Attorneys for complainant.

[fol. 18]

IN UNITED STATES DISTRICT COURT

STATEMENT RE PLEADINGS, ETC.

The pleadings in causes numbered 4273, 4274, 4275, 4276, 4277, 4278, 4279, 4280, 4281, 4282, 4283, 4284 and 4285 are identical with the pleadings in cause No. 4272 except as to parties and amounts, but insofar as they relate to the issue presented on appeal, are in fact identical and the court's decision based on the pleadings filed in cause No. 4272 is determinative of all the issues in all the cases filed herein.

• • • • • • •

[fol. 19]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT (ALL CAUSES)
—Filed January 18, 1960

In accordance with the stipulations heretofore entered into between the parties, the Court finds as follows:

[fol. 20] I. That the suits by plaintiffs against United States of America allegedly arise under the terms of the Federal Tort Claims Act, 28 U.S.C. 1346 et seq. and allegedly are brought under the Oklahoma Wrongful Death Statute, to wit: 12 O.S. Sec. 1051, et seq.

II. That, in the actions brought by plaintiffs against American Airlines, there is diversity of citizenship between the parties.

III Convair Airplane 240, registration No. N-94221, was owned and operated by American Airlines and, on the 4th day of August, 1955, was being operated by American Airlines as Flight 476 when it crashed at Fort Leonard Wood, Missouri.

IV. That, at the time of the crash, the airplane was being operated by Captain Hugh Barron, as pilot, and William Grover Gates, as co-pilot. That Hugh Barron and William Grover Gates were employees of American Airlines at the time of the crash and were fatally injured as a result of the crash.

V. That Harold M. Fields, Morris W. Akin, Kurt D. Richards, Samuel H. Hobson, Robert I. Zelens, John Leland Cross, Jr., James Howe, Wayne Howe, Donald L. Carr-Harris, Virgil D. Maupin, Tilson J. Farough, Herman F. Schmyser and William E. O'Neal were all fare paying passengers, lawfully aboard American Airlines Flight 476, and all perished in the crash occurring at Fort Leonard Wood, Missouri.

VI. That the death of the crew members and all fare paying passengers occurred within the State of Missouri.

VII. That plaintiffs allege negligence on the part of the United States of America, occurring prior to the 4th day of August, 1955, at the American Airlines Overhaul Depot located at Tulsa, Oklahoma, which they allege was the proximate cause of the crash and deaths of the members of the crew and fare paying passengers.

VIII. That plaintiffs have received full satisfaction of any cause of action they may have under the terms and provisions of the Wrongful Death Statute of the State of Missouri.

CONCLUSIONS OF LAW (ALL CAUSES).

In accordance with the above Findings of Fact, the Court determines as follows:

I. The Court has jurisdiction of the parties and the subject matter of these actions.

II. In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) et seq. are applicable.

[fol. 21] III. It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV. There is no cause of action under the Oklahoma Wrongful Death Statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V. If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder.

VI. The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death statute.

VII. The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction of any claims they might have thereunder.

VIII. The complaints in the above action should be dismissed with prejudice.

IX. Since the complaints against the United States are to be dismissed, it is unnecessary to pass upon the third party complaints asserted by the United States against American Airlines.

ORDER OF JUDGMENT (ALL CAUSES).

In accordance with the above findings of fact and conclusions of law, the complaints in the above actions are hereby dismissed with prejudice.

Royce H. Savage, Judge.

Approved: Speiser, Quinn & O'Brien, Rucker, Tabor & Cox, By Joseph A. Sharp, Attorneys for Plaintiffs: Rhodes, Crowe, Hieronymus & Holloway, By Attorneys for Intervenor, Robert Rizley, as to form, By Russell H. Smith, Attorneys for United States of America; Pierce, Mock & Duncan, Couch & Hendrickson, Jackson, Walker, Winstead, Cartwell & Miller, By W. B. Patterson, Attorneys for American Airlines, Inc.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL (ALL CAUSES)—Filed March 15, 1960

Notice is hereby given that plaintiff-appellant appeals against the United States of America, defendant-appellee,

[fol. 22] to the United States Court of Appeals for the Tenth Circuit from the Order of Dismissal entered on the 18th day of January, 1960.

Joseph A. Sharp, Attorney for Appellants.

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IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS (ALL CAUSES)—Filed March 15, 1960

The points upon which appellants will rely on appeal are:

1. The court erred in dismissing the complaints of the appellants.

Joseph A. Sharp, Attorney for Appellants.

STATEMENT RE APPEAL BONDS

Appeal bonds were filed March 15, 1960.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PRE-TRIAL CONFERENCE PROCEEDINGS —October 26, 1959

Be It Remembered, that on the 26th day of October, A.D., 1959, in the above-designated Court, sitting at Tulsa, Oklahoma the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for further pretrial conference, and with it seventeen other cases involving the same circumstances.

The plaintiffs were present and represented by Joseph A. Sharp, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma.

The United States of America was present and represented by Robert S. Rizley, Esq., U. S. Attorney, and by Russell H. Smith, Esq., Assistant U. S. Attorney for the Northern District of Oklahoma, and by Harry Stein, Esq., Department of Justice, Washington, D.C., and By W. A.

Crawford, Esq., F.A.A., Washington, D.C., all Attorneys and Counselors at Law.

And, thereupon, the following proceedings were had, to wit:

The Court: Do you have the appearances, Mr. Reporter?

(The reporter responded that he did not; and the following appearances were entered:)

[fol. 23] Mr. Pierce: Fred Mock, Melvin Pierce, and Mr. Patterson, for the defendant American Air Lines.

Mr. Smith: Robert S. Rizley, Russell Smith, Harry N. Stein, aof [sic] the Department of Justice, and W. A. Crawford, F.A.A. Agency, for the United States of America.

The Court: Joe, it looks like you are badly out-numbered this morning.

Mr. Sharp: Been that way ever since we started.

The Court: And you seem to have the judge of the Court causing you trouble too. What do you have to say for yourself this morning?

Mr. Sharp: "Ouch!" Judge—

The Court: Do I have you in the corner yet?

Mr. Sharp: I don't know how much point there is in arguiing [sic] this thing. It looks to me like, from your letter, you plan to follow Mr. Patterson's theory on this matter, which, as I see Mr. Patterson's position, he is either questioning the Union Trust Company case, or the like, or contends that it doesn't have the interpretation we put on it. And if it doesn't have the interpretation we put on it, you are right, that's all.

The Court: Well, it goes beyond that. Actually my decision is not based on the question involved in the Union Trust case or the Hess case,—I say, "my decision"—I haven't decided yet, except I have made up my mind and I have indicated to you what I propose to decide,—

Mr. Sharp: Yes, sir.

The Court: On that issue. And I am assuming that—In other words, I just pass the question that is now pending before the Supreme Court in the Hess case.

Mr. Sharp: Yes, I appreciate that.

The Court: But, in any event, I think the Oklahoma law applies.

[fol. 24] Mr. Sharp: But also in applying the Oklahoma law, you also have to apply the Oklahoma conflicts rule.

The Court: Apply the Oklahoma conflicts rule; and when we do that, we apply the Missouri law, with the limitations included in the statutory relief provided under the Missouri law, which limits recovery to—

Mr. Sharp: $15,000.

The Court: $15,000.

Mr. Sharp: Well, I understood that was your reasoning. Which is contrary to our hoped-for interpretation of the Hess case, in that the Government—in the Eastern Air Lines case—actually there were two verdicts rendered, one for $15,000 against the Government under the Virginia law, and one for $60,000 against American Air Lines under the District of Columbia law. At least, it is our interpretation, Judge, and it may be wrong, that—at least the Circuit Court in the District of Columbia felt that when the Government waived its immunity to suit they could lay any requirements upon that immunity, and could—and apparently did. I don't know how the Government could say, "You will apply the law of the State and you will not follow the conflicts of law rule." There is no way to reconcile that Eastern Air Lines decision, in view of the two verdicts, in my mind, with the rest of the cases. Apparently, as the Government, they applied the internal law of Virginia in an accident that the court found happened in the District of Columbia; and they have held that the limitation of Virginia was against the Government, even though it was outside of Virginia, on the ground that the remission charge against the Government—in other words, they awarded damages against the American Air Lines in the sum of $60,000 in the District of Columbia. That is my understanding of the case. Every time I read it I get more confused—the basis of that is what came out of that decision. It seems to me impossible. In my experience in Denver you could never have any problem like that in a case without the Circuit Court asking somebody about it at some time. It seems to me it is a case standing by itself. But what seemed to be the interpretation they have put on it; and in that case I don't think there is any escape from the

fact that as against the Government they applied the Virginia limitation on an accident that the Court found happened outside of Virginia—happened in the District of Columbia. Therefore they limited recovery on the Govern- [fol. 25] ment for $15,000, and awarded damages against the American Air Lines for a greater sum—or Eastern Air Lines. And that's the problem that we have wrestled with ever since we have had this case.

The Court: What do you suggest as to further procedure?

Mr. Sharp: Well, Judge, this is just a thought that came to my mind—I don't know whether it is feasible, or not: but if that is the feeling of Your Honor, that you have to apply the Missouri law, and therefore the limitations come up, then at least it is my thought that where we have agreed to a settlement for $15,000, although we have an excuse we have no right to further damages against the Government because it has been paid. And my suggestion would be this: It is my thought you take one of those cases—and I am sorry that right now I can't think of one of them, but we have admitted in the interrogatories those that have been settled—

Mr. Patterson: Six of them.

Mr. Sharp: I think you take any one of those and order a dismissal of that lawsuit on the ground there could be no recovery because the money has been paid, and we could take an appeal on that as to the legal questions, with the stipulation that the final effect of that appeal will apply to all of these cases, because if Your Honor's position is sustained, quite frankly they have an agreement worked in the other American Air Lines cases—

Mr. Patterson: Judge, we are prepared in the four other cases where there is a direct action against American Air Lines—I believe one of them, to tender into the Court, the $15,000 maximum benefits under the Missouri law, which would put them in the same shape that the six we have already paid in. Now, there are two other cases which are employe cases of American Air Lines where compensation has been paid. Now, I don't know what the amount of the benefits are, and I further don't know what the law of Oklahoma is with reference—

Mr. Sharp: It is an exclusive remedy; I think there is no problem there.

Mr. Patterson: With reference to the subrogation on those two cases I am not clear at all, but I think as to all of the cases other than the two employe cases with our payment of $15,000 that it could result in just simply an order of dismissal.

[fol. 26] Mr. Sharp: At least that was my thought, Judge, which would be less burdensome. We would like, however, for Your Honor to make the necessary findings of fact and conclusions of law upon which we would appeal, which would include these problems, so we would have it resolved once and for all. To me, Judge, I think that would be less trouble for the Court and it would confine our area to the legal area. I will be quite candid, Your Honor, if that is the law we are through with these lawsuits.

The Court: What do you suggest, Mr. Stein, if anything?

Mr. Stein: Well, it seems to me that that wouldn't be an unreasonable way to handle it. I expect that Mr. Patterson's proposal is also satisfactory to you.

The Court: These cases are consolidated.

Mr. Patterson: Rather than the Court making findings of fact, I think we can stipulate on the facts. I don't believe there are any controverted facts which would relate to this particular issue.

Mr. Sharp: That's right.

Mr. Patterson: We can stipulate the doggoned thing happened in Missouri and all of the other facts which would be necessary.

The Court: Well, I think the Court should make findings of fact, however, based on your stipulation—prepare findings of fact and conclusions of law.

Mr. Patterson: The burden ought not to be put on the Court.

Mr. Sharp: I think as far as the legal ramifications of this action, the facts have already been admitted to the Court.

Mr. Patterson: I think they have.

Mr. Stein: For whatever it is worth, I believe you are aware of the fact that the Hess case was argued in the Supreme Court a couple of weeks ago.

The Court: Yes, sir.

Mr. Stein: I don't necessarily say that would dispose of anything, but that may be coming down with an opinion in a couple of weeks.

[fol. 27] The Court: Well, if the Hess case is affirmed that would dispose of your appeal, I think.

Mr. Stein: That's right—I mean, it depends on what they say, of course.

The Court: If it is reversed I think I still have to hold the way I do.

Mr. Stein: It depends on the basis for the affirmance if it is affirmed. They could affirm on the factual aspects of the case without even reaching this question; but it could depend on the language of the Court. We just don't know, obviously.

The Court: No. Well, the reason I decided not to await the decision of the Hess case was because I was of the view after I studied these briefs that any way the Hess case may be decided, I have got to hold that the Missouri law applies. I was of the opinion that there isn't anything that the Supreme Court could say in the Hess case that would justify the conclusion by the Court in this case that the Missouri law is applicable.

Mr. Stein: Well, as I say I won't try to predict what the Supreme Court might say; even in passing that they sometimes have a way of make observations which are significant. The Government's position in the Hess case on the argument to the Supreme Court was to the effect that this basic Eastern Air Lines question really wasn't significant, which was essentially the position we took in opposing the petition for a writ. And I might say that I wasn't able to be present at the argument. I tried very much to be present to see how the wind seemed to be blowing and I couldn't get there. But I was told that there was some brief reference to the Union Trust Company problem, but they didn't spend nearly as much time on that as they did on the other aspects of the case, the applicable law, complications, and so on. So I just wouldn't dare to even attempt to predict on what the opinion would say or whether it would throw any light on this question one way or the other.

Mr. Patterson: Well, I certainly feel that it wouldn't throw any light on whether or not the Oklahoma wrongful-death statute gives any cause of action for a death which occurs outside of the State of Oklahoma. I just can't conceive of anything the Court might be able to say or not say which would be binding on this court in attempting—these are suits filed here under the Oklahoma wrongful-death statute—

[fol. 28] The Court: Yes.

Mr. Patterson: If this Court feels that the Oklahoma wrongful-death statute does not give a cause of action for death which does not occur in the State of Oklahoma, then that is this court's interpretation of—

The Court: Well, that's the way I feel about it, as indicated in my letter. Certainly the Supreme Court is not going to pass on the Oklahoma law in the Hess case.

Mr. Patterson: I don't think they are either.

Mr. Stein: Of course I might say, in the interest of possibly clarifying one aspect of this problem, that while it is true that in the Union Trust Company case the Court of Appeals did not specifically touch on this problem which is in a sense a subsidiary problem to the basic problem, the question was in a sense presented to them in the briefs. Now, for whatever they may be worth I thought it might be valuable to bring the briefs along with me. It is true that in connection with the petition for reconsideration, which was the basis for this opinion we are talking about, the plaintiff did raise precisely the point that Mr. Sharp and Mr. Patterson are raising, so that it was before the Court. Now why the Court didn't specifically touch on that, I just don't know. It may be because there was some confusion, as a matter of fact as to where the deaths did occur—where the impact did occur. As you recall it, some parts of the plane fell in the District of Columbia, and other parts of the plane fell in Virginia; and it may be that for that reason they didn't reach the question. But it may be also that the Court thought this might be a distinguishable situation because none of the Virginia cases that were cited in support of the proposition dealt with precisely this kind of a situation. In other words, a wrongful act occurring in one place as distinguished from

where the impact occurred, and so on. I just don't know. But this kind of problem, I think I should say, was before the Court at least in the form of the briefs. And the Government did take the position that there was no contrast problem in the case, that is, that the Virginia wrongful death statute was the applicable statute. Nevertheless it is true that the opinion did not touch on it one way or the other. We regard this as by no means an open-and-shut basis, even on the basis of the Union Trust Company case.

The Court: Well, I agree with that statement. I don't think it is an open-and-shut case. But I feel very strongly [fol. 29] that the conclusion that I reach here is the logical conclusion to reach under Oklahoma law. And I might as well go ahead and do it. I believe the thing to do is to enter judgment in all of these cases in which—which are ready for entry of judgment. Now, let's see which ones they are.

Mr. Patterson: Will you tell from your list which ones are direct actions against us?

Mr. Pierce: Just in the four cases, 4542, 4546, 4583 and 4584 the American Air Lines is the sole party defendant.

Mr. Patterson: We are defendants along with the Government, but we have been directly—oh, they were consolidated; that's right—that's right, they were consolidated.

Mr. Pierce: They have been consolidated with other actions against the United States by the same plaintiffs.

The Court: Well, consolidated for trial only.

Mr. Pierce: The four cases against the Government by the same plaintiffs are 4277, 4278, 4280, and 4283.

The Court: Well, now, wait just a moment. In the four cases just mentioned against the American Air Lines, you tender $15,000 in each of the cases to the plaintiffs?

Mr. Patterson: Yes.

The Court: Which is the maximum sum recoverable under the Missouri wrongful-death statute.

Mr. Patterson: Yes, sir.

The Court: And—

Mr. Patterson: That will take care of eight of the cases as they now appear on the docket. Now, there are six other cases.

The Court: Uh huh.

Mr. Patterson: Where we have already paid.

[fol. 30] The Court: All right, let me have those.

Mr. Pierce: 4272, 4273, 4275, 4276, 4281 and 4284.

Mr. Sharp: Just— Judge, let me just interject this: I don't see how, in my own mind, Mr. O'Brien has worked it out. One of those was settled on a covenant—

Mr. Patterson: $15,000 was paid her; it was settled on a covenant was what it was settled on.

Mr. Sharp: There was some mix-up, though, as to what the covenants were. To me it doesn't impose a problem—

The Court: Yes.

Mr. Sharp: I am inclined to agree with Mr. Patterson if he thinks—

Mr. Patterson: $15,000 is $15,000.

Mr. Stein: I don't know that the question of what kind of a document it is is crucial. The important thing is how much money you get—and you can't get paid twice.

The Court: I understand where you have a covenant not to sue joint tort feasors you would fix the amount of recovery and deduct the amount; but when you do that fifteen and fifteen would be the same.

Mr. Sharp: That is my way of thinking. Maybe they have a different way of thinking back in New York.

Mr. Patterson: That leaves four cases.

The Court: That leaves four, or three?

Mr. Patterson: Four, 4279, 4282—those two cases are brought by the next of kin of employees of American Air Lines.

The Court: 3279 and 4282.

Mr. Patterson: Yes, sir. And in 4274 and 4285, they stand on a footing by themselves. I think suits are pending elsewhere directly against American Airlines, is what I think.

[fol. 31] Mr. Sharp: You may well be right. It seems to me that all of these—we don't undertake to represent people in direct suits against American Air Lines; you see we had enough problems as it was.

The Court: Yes.

Mr. Sharp: It seems to me that I had understood, however, that Mr. Patterson is right; that their cases had all

been settled or there were actions pending. I can verify that by this afternoon and let Your Honor know.

Mr. Patterson: Of course it won't be material to this court about that because the action here is simply against the Government and that will fall in the class of cases where the Court will just hold that the Missouri law is applicable, whether they sued the Government or whether they sued the American Air Lines.

Mr. Sharp: However, again, I am willing to stipulate, whatever the Circuit Court holds, or whoever finally decides this issue says the law is, it will be applicable to that case as far as I am concerned and as far as plaintiffs are concerned. I might, for the purposes of this, however, find out if there are suits pending and make the same tender in that Court, which, again, if that is made, would give Your Honor the right then to proceed on those cases as you do here on these.

Mr. Patterson: As soon as we get through here I am going to call New York and get, absolutely, the status of this. I wrote them last week but they didn't see fit to let me know.

The Court: What about the two cases in which employees of American Air Lines were involved?

Mr. Patterson: Well, as I understand, from talking to my lawyers up here, under the Oklahoma Compensation Act there is no right of subrogation.

Mr. Sharp: That's right.

Mr. Patterson: But the employees would be precluded from recovering against American Airlines because they have received compensation. So I think it—if it is correct that there is no subrogation in Oklahoma, I think they would fall into the general class of cases whereby their judgment has been satisfied.

[fol. 32] The Court: Uh huh.

Mr. Patterson: By payment of compensation.

The Court: Uh huh.

Mr. Sharp: Is that right, Judge?

Mr. Pierce: That's right, yes, sir.

Mr. Sharp: It sounds reasonable. However, our death action is 135.

Mr. Patterson: Well, maybe we will owe $1500, I don't

know. I don't know what these people were paid. I don't know what contract they were paid under.

Mr. Sharp: Hugh Barron was a resident of Tulsa, Oklahoma. I don't know about Gates—his place of employment was here. I will check. I think he probably received benefits under the Oklahoma contract; but I can check that.

The Court: Well, if that be the situation then—

Mr. Patterson: We will pay the $1500—

The Court: This judgment will be entered in this case in conformity with the judgment rendered in the others.

Now that will leave pending two cases then where you are of the opinion—

Mr. Patterson: Yes, sir, I think there are suits pending in Detroit or Chicago, or some place; I just don't know.

Mr. Sharp: It seems to me he is right, Judge.

Mr. Pierce: There is one action pending, the Schmyser case—I am just looking at correspondence in the file, Herman F. Schmyser—well, brought by Josephine M. Schmyser, Administratrix.

Mr. Patterson: Where is that pending?

Mr. Pierce: That is in Detroit—this is a Detroit lawyer that writes on that—I don't know.

[fol. 33] Mr. Patterson: I was thinking there was something about Detroit. We can check all of these things out and get—

The Court: What further procedure should be followed in those cases, assuming that you have actions pending in other jurisdictions?

Mr. Patterson: I assume if they have been brought by the right parties, under the Missouri Act within the prescriptive period of the law of the forum where they are pending, I would assume that we have attempted to pay the people $15,000 all along. I just don't know anything about those lawsuits.

The Court: I suppose then what we should do is to give you time to find out just what the facts are with respect to those two cases, and the status of them.

Mr. Patterson: I will do that, yes, sir.

The Court: And then in the light of the disposition made on the others we can then determine what should be done on those two. Okay, anything else?

Mr. Patterson: Not that I know of.

The Court: All right.

Mr. Patterson: Would the Court like for us to report back to him later during the day if we can get this information together?

The Court: If you can do that.

Mr. Patterson: Or maybe we can work it out among ourselves and just submit an order to the Court.

The Court: All right.

Mr. Sharp: That will be agreeable.

The Court: Now, will you prepare findings of fact and conclusions of law, Mr. Patterson?

Mr. Patterson: I would love to, Your Honor.

The Court: I thought you would be that accommodating.

[fol. 34] Mr. Patterson: Yes, I will, Judge.

The Court: You do that then, and get it approved and present it for signature at your earliest convenience.

Mr. Patterson: All right, Your Honor.

Thank you, Sir.

The Court: All right, Gentlemen.

Mr. Sharp: Thank you, Judge.

Filed March 15, 1960.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS FOR CLARIFICATION OF ORDER —December 2, 1959

Be It Remembered that on the 2nd day of December, A. D., 1959, in the above-designated Court, sitting at Tulsa, Oklahoma, the Honorable Royce H. Savage, United States District Judge, presiding, this above-styled and numbered cause came on regularly for clarification of order.

The plaintiff was present and represented by Joseph A. Sharp, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma.

The defendant United States of America was present and represented by Russell Hunt Smith, Esq., Attorney and Counselor at Law, of Tulsa, Oklahoma, Assistant United States Attorney for the Northern District of Oklahoma.

Other defendants were present and represented by Melvin Pierce, Esq., Attorney and Counselor at Law, of Oklahoma City, Oklahoma.

And thereupon the following proceedings were had to-wit:

The Court: All right, gentlemen.

Mr. Sharp: Judge, what we have basically met here for, I don't think it is too much controversy except in the minds of New York and Dallas, on these conclusions of law, paragraph 3, Mr. O'Brien, for the plaintiff, is rather insistent that he wants a determination that Oklahoma law is ap-
[fol. 35] plicable. Mr. Patterson liked it the way we did originally work it out.

Now, basically, I think we come down to the same fact, eventually. The only thing, Mr. O'Brien wrote me in the letter, he is worried about, will we get out of Circuit Court. The Circuit Court says, Well, before we decide this, the other question, is it necessary for the trial judge to determine that he has got to apply one law or the other? As I read it, that is basically his worry—they are afraid the Circuit Court will send it back to determine whether you say it is either Missouri law or Oklahoma law. It seems to me I would be quite candid with Your Honor, it seems to me that on the possibilities we have got, that we have got the issues raised rather pointedly, the way we originally had it, but he does voice that objection.

The Court: Well, the reason that I didn't care to express an opinion on that point is because I think that is a point that will be resolved by the Supreme Court of the United States in this case now pending in that Court. And it is not a question of fact: it is a legal question. And whether I have a conclusion of law stated here or not, if that is a legal question necessary to the decision of the case, the Court of Appeals would reach the question. And additionally, by that time the Supreme Court would have settled it. So it is not necessary for me to try to forecast what the Supreme Court is going to say about it.

Mr. Sharp: I agree with Your Honor on that.

The Court: If that had been an essential to a decision of the case I would have awaited that decision. The reason I went ahead is because I came to the conclusion that I had

to reach the same result regardless of the conclusion reached by the Supreme Court on the question of whether you apply Oklahoma law or Missouri law.

Mr. Sharp: Even—because, eventually you will have to apply the Missouri law, regardless, even if you start out under Oklahoma law you are going to end up in Missouri; you can't make extra-territorial application of the death statute.

The Court: That's right. In other words, you are on the horns of a dilemma; you take the one horn and say that Missouri law applies; then your recovery is based on Mis- [fol. 36] souri wrongful death statute, with the $15,000 limitation—

Mr. Sharp: That's right.

The Court: If we take the other, and say the Oklahoma law applies, then there is no common law action in Oklahoma for wrongful death. The right of action under Oklahoma law is purely statutory. So in applying Oklahoma law we look to the Oklahoma statute—the wrongful death statute and the decisions of the Supreme Court of Oklahoma construing that statute, the Oklahoma Supreme Court has said that the Oklahoma wrongful death statute has no extra-territorial application. So, since the deaths occurred in Missouri, even though it may have been due to negligence which occurred in Oklahoma, under the Oklahoma conflicts-of-law rules we must apply again the Missouri wrongful death statute; so we just come full circle and wind up at the same place.

Mr. Sharp: Well, that was my understanding of it and for that reason, I mean since we are going to get the same result it isn't necessary because we are going to apply Missouri law anyway; that's the way Your Honor feels about it.

The Court: That's the only reason I went ahead and decided—

Mr. Pierce: Otherwise I think Your Honor would have waited—

The Court: I would have—if I had been of the opinion that a decision in the case depended entirely upon the legal question now under consideration by the Supreme Court, with these conflicting decisions of the two Circuits, then I think it would have been good judgment to have awaited

the decision of the Supreme Court. It should not be too far away. The case has been argued. But suppose the Supreme Court decides that question favorable to your position, then you are still on the short end, according to my view of the law, don't you see?

Mr. Sharp: Yes, sir.

The Court: So I just concluded we might as well go ahead.

Mr. Sharp: Now, Judge, the only—like Mr. Smith and Mr. Pierce and I have been talking, the only thing we want to be sure of is that, among other things, we present this conflict of law problem. Then though Mr. Patterson's view is favorable to that in this case—according to the [fol. 37] letter that I received, the holding that they think I am right as far as the conflicts-of-law rule Oklahoma conflicts not being applicable, the only thing we want to make sure is that we present that squarely to the Circuit, because I think we are going to have to eventually go to the Supreme Court—I don't think we will get any relief out of that, to be honest with you, because, as I said, this Union Trust case is kind of on a rule of its own here.

Mr. Pierce: Your Honor, did you not answer that,—I think that the answer rests not on the facts of the case since the question is one of law, and the question is there for the Circuit if they want to say that in their opinion the rule of law applicable to these facts—

The Court: Yes.

Mr. Pierce: Is in the Hess decision, or under the Union Trust Company—it is there for them to decide.

The Court: I have made it as clear as I know how to. If I haven't made it clear up to this point there isn't any way that I can do it.

Mr. Sharp: I think I—you make it abundantly clear to me, Your Honor.

The Court: I see no reason why the matter could not or should not be squarely put to the Court of Appeals.

Mr. Sharp: I think it is about as squarely as it can be.

The Court: I have made the statement on two or three occasions into the record. I wrote a letter in which I—I believe I outlined the same—the same view as to the legal questions involved. I tried to indicate why I felt that it

was not worth while to await this decision by the Supreme Court.

Mr. Sharp: Oh, I think we are agreed on it, aren't we, Melvin?

Mr. Pierce: I think so.

Mr. Smith: I wondered if you wanted to ask the Court to review that other matter.

[fol. 38] Mr. Sharp: It was merely some grammatical correction. I don't think it has anything to do with anything except—do you, Melvin?

Mr. Pierce: Nothing.

Mr. Smith: Has the Court seen this?

Mr. Sharp: He has seen this; it has nothing to do—it is nothing but a grammatical correction.

Didn't you change that? I thought you did.

There is no change in the substance at all.

Mr. Pierce: That's right. We worked until midnight figuring that thing out.

Mr. Sharp: We had fourteen different points of view on what Your Honor said—you would be surprised. I mean, people heard Your Honor different in one room.

The Court: That's one reason I hesitate to start talking again.

Mr. Sharp: The only thing we changed, we had omitted some cases in the caption, and some cases were incorrectly designated. There has been no substantive change in that at all. Some grammatical corrections have been changed.

The Court: The only person who signed it was Mr. Patterson.

Mr. Sharp: I'm going to sign it right now.

The Court: Will there be other signatures on it? If so, I will sign it.

Mr. Sharp: I will have to get Phil Landa to sign it.

Filed March 15, 1960.

[fol. 39] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 44] Minute entry of argument and submission—September 14, 1960 (omitted in printing).

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 6378-6391

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of Debra Sue Richards et al., Petitioners,

v.

UNITED STATES OF AMERICA, et al., Respondents.

Joseph A. Sharp (Speiser, Quinn & O'Brien, Edward M. O'Brien; Rucker, Tabor, Best, Sharp & Shepherd, Truman B. Rucker and O. H. "Pat" O'Neal were with him on the brief) for Appellants.

Sherman L. Cohn, Department of Justice Attorney, (George Cochran Doub, Assistant Attorney General; B. Hayden Crawford, United States Attorney; and Morton Hollander, Department of Justice Attorney, were with him on the brief) for Appellee, United States of America.

Fred M. Mock (W. B. Patterson and Melvin F. Pierce were with him on the brief) for Appellee, American Airlines, Inc.

Before Murrah, Chief Judge, and Bratton and Pickett, Circuit Judges.

OPINION—November 25, 1960

BRATTON, Circuit Judge:

A passenger airplane owned and operated by American Airlines on a regularly scheduled flight crashed in Missouri and everyone on board was killed. Invoking pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. §§1346, 1402, and the so-called Wrongful Death Statutes of Oklahoma, O.S. 1951, Title 12, chapter 17, §1051, et seq.,

survivors or legal representatives of passengers who lost their lives instituted in the United States Court for [fol. 46] Northern Oklahoma fourteen separate actions against the United States for the recovery of damages. The basis of the claim pleaded in each case was negligence on the part of the United States, acting through the Civil Aeronautics personnel, in permitting American Airlines to employ and use unsafe practices and procedures at its overhaul depot at Tulsa, Oklahoma, in repairing, rebuilding, overhauling, and inspecting its aircraft, aircraft engines, and component parts. More specifically, it was pleaded that as the result of such negligence, an unfit and unsafe cylinder was placed in one of the engines of the airplane at the overhaul depot; that the cylinder failed; and that such failure caused the crash. The United States denied negligence; denied liability; pleaded that the accident was an unavoidable casualty; pleaded that the complainants were barred from recovery against the United States by reason of payments made to them by American Airlines and releases given to such company; and pleaded in the alternative that the amounts paid should be taken into account in mitigation of damages against the United States. And by third party complaints, the United States asserted against American Airlines a right of indemnity in the event of recovery against the United States. American [fol. 47] Airlines pleaded that the complaints failed to state a cause of action against the United States; pleaded that the deaths were an unavoidable casualty; pleaded that the actions were barred by the statutes of limitation of Missouri; and pleaded that certain of the complainants were barred from recovery against the United States by reason of releases given to American Airlines. The actions were consolidated for trial. In some of the cases, American Airlines made payment in each case of $15,000 to the complainants and releases and satisfactions of liability were executed. In the other cases, American Airlines during the course of a pre-trial conference tendered to the complainants in each case $15,000. Following the pre-trial conference, findings of fact and conclusions of law were made; and judgments were entered dismissing the actions.

The cases present a situation in which the alleged wrongful acts and conduct on the part of the United States occurred in Oklahoma and the deaths of the decedents occurred in Missouri. While it would be trite in ordinary circumstances to do so, it may be appropriate in this case to say that, in the absence of a controlling statute providing otherwise, the general rule is that where an act of omission [fol. 48] or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place. Betts v. Southern Railway Co., 71 F.(2d) 787; Hunter v. Derby Foods, 110 F.(2d) 970; Lowry v. International Brotherhood, etc., 220 F.(2d) 546; Eastern Air Lines v. Union Trust Co., 221 F.(2d) 62, certiorari denied, 350 U.S. 911; Orr v. Sasseman, 239 F.(2d) 182; Cameron v. Vandegriff, 53 Ark. 381, 13 S.W. 1092; Strogoff v. Motor Sales Co., 302 Mass. 345, 18 N.E.(2d) 1016; Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766; Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692; Hughes Provision Co. v. La Mear Poultry & Egg Co., (Mo. App.), 242 S.W.(2d) 285; Gaston v. Wabash Railroad Co., (Mo.), 322 S.W.(2d) 865; Mann v. Policyholders' National Life Insurance Co., 78 N.D. 724, 51 N.W.(2d) 853. See also Restatement, Conflict of Laws §377. And that rule has been applied in cases in which the act of omission or commission in respect to a passenger airplane occurred at one place while the resulting accident and death took place at another. Faron v. Eastern Airlines, 84 N.Y.S.(2d) 568; Riley v. Capital Air-[fol. 49] lines, 199 N.Y.S.(2d) 515. It is readily conceivable that solution of the problem could be more difficult in a case in which the initial act of omission or commission occurred at one place, personal injury at another, and resulting death later at a third. But no situation of that kind is presently presented.

If the Tort Claims Act were silent in respect to the matter and the general rule to which reference has been made had application with controlling effect, it seems clear that the situs of the actionable wrong involved in these cases would be in Missouri and the liability of the Government to respond in damages would be referable to the substan-

tive law of that state. But the Tort Claims Act is not silent in that area. For reasons of its own choice, Congress took effective action to make a different rule applicable to the Government in such cases. Title 28, section 1346(b), United States Code, authorizes suits against the Government for death caused by the negligent or wrongful act of an employee of the Government while acting within the scope of his employment if a private person would be liable in accordance with the law of the place at which such act or omission occurred. And Title 28, section 2674, provides in presently pertinent part that the Government shall be liable [fol. 50] in respect to the provisions of the title relating to tort claims in the same manner and to the same extent as a private person under like circumstances. When construed together, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to subject the Government to liability according to the tests and standards of the substantive law of the state in which the act or omission occurred. Except when expressly provided otherwise in the Act itself, the effect of the two provisions in a case in which the act or omission occurs at one place and resulting death at another is to equate the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred. Eastern Air Lines v. Union Trust Co., supra; Voytas v. United States, 256 F.(2d) 786. Concededly, a contrary view was expressed in United States v. Marshall, 230 F.(2d) 183, and Hess v. United States, 259 F.(2d) 285, vacated on grounds not germane here, 361 U.S. 314. But we are persuaded that our view finds adequate support in the Act.

The Supreme Court of Oklahoma has had occasion to [fol. 51] observe from time to time that at common law the wrongful death of a person did not create a right of action for damages; and that the right of action in that state is purely statutory. F. W. Woolworth Co. v. Todd, 204 Okl. 532, 231 Pac.(2d) 681; Gochenour v. St. Louis San Francisco Railway Co., 205 Okl. 594, 239 Pac.(2d) 769; Herndon v. Dolton-Barnard Hardware Co., (Okl.), 289 Pac.(2d) 970;

Mathies v. Kittrell, (Okl.), 350 Pac.(2d) 951. The right of action in that state is created by 12 O.S. 1951 §1053. The statute provides in substance that when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission; it further provides that the damages shall inure to the persons named; and it further provides the manner in which such damages shall be distributed. The statute in its entirety creates a new right of action, specifies the persons who may maintain the action, and blueprints the distribution of the damages recovered in the action. Gochenour v. [fol. 52] St. Louis San Francisco Railway Co., supra. But it does not indicate directly or indirectly a legislative intent or purpose to undertake to create a cause of action for wrongful death occurring in another state. Neither does it suggest an intent or purpose to make it apply to actions brought in the courts of Oklahoma for wrongful death occurring outside the state. Standing alone, it is limited in effect to wrongful deaths which occur in Oklahoma. However, assuming that it is brought in the name of the proper party plaintiff, against the proper party defendant, with jurisdiction over the person of the defendant, a transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy. An action of that kind in the courts of Oklahoma is not one under the domestic statute of Oklahoma relating to wrongful death. It is one for the enforcement of a right of action having its source in the law of the state in which the wrongful death occurred. Chicago, Rock Island & Pacific Railway Co. v. McIntire, 29 Okl. 797, 119 Pac. 1008; McCoubrey v. Pure Oil Co., 179 Okl. 344, 66 [fol. 53] Pac.(2d) 57; Gochenour v. St. Louis San Francisco Railway Co., supra; Fenton v. Sinclair Refining Co., 206 Okl. 19, 240 Pac.(2d) 748.

It was pleaded in the complaints in these cases that the actions arose under the Tort Claims Act, supra; and that they were brought under the Wrongful Death Statutes of Oklahoma, supra. No reference was made in the complaints to the laws of Missouri respecting wrongful death. But since the wrongful deaths pleaded in the complaints occurred in Missouri, we take occasion to explore the question whether a cause of action was pleaded for which the complainants were entitled to relief by way of damages under the laws of that state. A right of action for wrongful death exists by statute in Missouri. Nelms v. Bright (Mo.), 299 S.W.(2d) 483. Quite similar to the wrongful death statute of Oklahoma, supra, at the time of the airplane crash referred to herein, it was provided by statute in Missouri that when the death of a person was caused by a wrongful act, neglect, or default of another, and such act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages therefor, an action for damages [fol. 54] might be maintained, notwithstanding the death of the person injured. R. S. Mo. 1939, §3653. And at the time of such airplane crash, it was further provided by statute in Missouri that damages not to exceed $15,000 might be awarded for wrongful death. R. S. Mo. 1939, §3654. No limitation in respect to amount of damages is provided by statute in Oklahoma. But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute. And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered. Stoltz v. Burlington Transportation Co., 178 F.(2d) 514, certiorari denied, 339 U.S. 929; Burlington Transportation Co. v. Stoltz, 191 F.(2d) 915.

The maximum recovery of damages under Missouri law at the time of the airplane crash being $15,000, payment of that amount to the complainants in some of these cases

and the deposit of that amount in the registry of the court [fol. 55] in the other cases, constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred. Hanson v. Norton, 340 Mo. 1012, 103 S.W.(2d) 1.

The judgments of dismissal are severally affirmed.

MURRAH, Chief Judge, dissenting:

I agree that the government is liable in these cases as a private person in accordance with Oklahoma law, i.e., the place where the alleged negligent act or omission occurred. I also agree that the inapplicability of the Oklahoma wrongful death statute to deaths outside the state does not preclude the right to recover in cases like these, even though a private person would not be liable according to Oklahoma law under the same circumstances.

We know that few, if any, state wrongful death statutes have any extraterritorial effect. If, therefore, the right to recover under the Tort Claims Act in cases like these is made to depend upon the extraterritorial effect of the [fol. 56] wrongful death statute of the place of the negligent act, the Act would be inapplicable to all such cases. Surely Congress did not intend any such anomalous result.

The majority avoids this blind spot in the law by resort to the Oklahoma conflict of laws rule, which authorizes maintenance of a suit in Oklahoma for wrongful death occurring outside the state, in accordance with the law of the state where death resulted. And see Fenton v. Sinclair Refining Co., 240 P.2d 748. The effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act. The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, i.e., Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place

where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

In my view, Congress intended to avoid this circuitous [fol. 57] stacking of one conflicts rule on another in order to arrive at controlling substantive law. Rather, it is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. If Congress had intended otherwise, it could have simply conferred jurisdiction upon the courts to hear and decide claims for damages for death caused by the negligence of the United States "under circumstances where the United States, if a private person, would be liable to the claimant" and stopped there. In this setting, these suits would be maintainable in Oklahoma in accordance with the law of Missouri, by virtue of the Oklahoma conflicts rule, that is, the law of the place where the accident occurred. When, however, Congress went on to say in effect that the government would be liable to the claimant as if a private person "in accordance with the law of the place where the act or omission occurred," it thereupon removed the traditional cloak of immunity and left the government standing as a private person, but prescribed the law and the conditions under which it would become liable.

Such is the import and result of Eastern Airlines v. [fol. 58] Union Trust Co., 221 F.2d 62. I would follow the majority view in that case and apply the Oklahoma wrongful death statute.

[fol. 59]

IN UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton and Honorable John C. Pickett, Circuit Judges.

JUDGMENT—November 25, 1960

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of dismissal are severally affirmed.

[On December 31, 1960, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.]

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUZANNE THOMAS RICHARDS, etc., et al., Petitioners,

No. 753, October Term, 1960

SUZANNE THOMAS RICHARDS, ETC., et al., Petitioners,

vs.

UNITED STATES et al.

ORDER ALLOWING CERTIORARI—May 8, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.